

IN THE UNITED STATES DISTRICT COURT  
FOR THE WESTERN DISTRICT OF TENNESSEE  
EASTERN DIVISION

FILED BY 8 D.C.  
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WAYNE MCKENZIE,

Plaintiff,

vs.

ENNU SURRENDER,

Defendant.

No. 05-1027-T/An

ORDER ASSESSING FILING FEE  
ORDER OF DISMISSAL  
AND  
ORDER CERTIFYING APPEAL NOT TAKEN IN GOOD FAITH

Plaintiff Wayne McKenzie, prison registration number 108203, an inmate at the Hardeman County Correctional Facility ("HCCF"), in Whiteville, Tennessee, filed this complaint under 42 U.S.C. § 1983. The Clerk of Court shall record the defendant as Ennu Surrender.

I. Assessment of Filing Fee

Under the Prison Litigation Reform Act of 1995 (PLRA), 28 U.S.C. § 1915(b), all prisoners bringing a civil action must pay the full filing fee of \$150 required by 28 U.S.C. § 1914(a). The in forma pauperis statute, 28 U.S.C. § 1915(a), merely provides the prisoner the opportunity to make a "downpayment" of a partial filing fee and pay the remainder in installments.

In this case, plaintiff has properly completed and submitted both an in forma pauperis affidavit and a prison trust fund account statement. Pursuant to 28 U.S.C. § 1915(b)(1), it is ORDERED that plaintiff cooperate fully with prison officials in carrying out this order. It is further ORDERED that the trust fund officer at plaintiff's prison shall calculate a partial initial filing fee equal to twenty percent of the greater of the average balance in or deposits to the plaintiff's trust fund account for the six months immediately preceding the completion of the affidavit. When the account contains any funds, the trust fund officer shall collect them and pay them directly to the Clerk of Court. If the funds in plaintiff's account are insufficient to pay the full amount of the initial partial filing fee, the prison official is instructed to withdraw all of the funds in the plaintiff's account and forward them to the Clerk of Court. On each occasion that funds are subsequently credited to plaintiff's account the prison official shall immediately withdraw those funds and forward them to the Clerk of Court, until the initial partial filing fee is paid in full.

It is further ORDERED that after the initial partial filing fee is fully paid, the trust fund officer shall withdraw from the plaintiff's account and pay to the Clerk of this Court monthly payments equal to twenty percent (20%) of all deposits credited to plaintiff's account during the preceding month, but only when the amount in the account exceeds \$10.00, until the entire \$150.00 filing fee is paid.

Each time that the trust fund officer makes a payment to the Court as required by this order, he shall print a copy of the prisoner's account statement showing all activity in the

account since the last payment under this order, and file it with the Clerk along with the payment.

All payments and account statements shall be sent to:

Clerk, United States District Court, Western District of Tennessee, 262 Federal Building, 111 S. Highland, Jackson, TN 38301

and shall clearly identify plaintiff's name and the case number on the first page of this order.

If plaintiff is transferred to a different prison or released, he is ORDERED to notify the Court immediately of his change of address. If still confined he shall provide the officials at the new prison with a copy of this order. If the plaintiff fails to abide by these or any other requirement of this order, the Court may impose appropriate sanctions, including a monetary fine, without any additional notice or hearing by the Court. The Clerk shall mail a copy of this order to the prison official in charge of prison trust fund accounts at plaintiff's prison. The obligation to pay this filing fee shall continue despite the immediate dismissal of this case. 28 U.S.C. § 1915(e)(2). The Clerk shall not issue process or serve any papers in this case.

## II. Analysis of Plaintiff's Claims

Plaintiff McKenzie sues HCCF Dr. Ennu Surrender. He alleges that he filed a grievance against Dr. Surrender on January 12, 2005, because his medication was late. Plaintiff alleges that Surrender retaliated for the grievance by reducing plaintiff's "Artane" to one quarter of a pill causing him to have hallucinations. McKenzie states that he desperately needs his medication but will "have to start refusing" it because he cannot take it as

prescribed. McKenzie requests that Dr. Surrender be fired, and he seeks one million dollars in damages.

McKenzie attached a copy of grievance no. 11510/159203, filed on May 24, 2004, wherein he requested to see Dr. Surrender because he was “hearing voices and hallucinating.” The grievance chairperson responded by contacting mental health personnel. Nurse Robbie Saxton responded that McKenzie had been seen multiple times by the psychiatrist, mental health coordinator, and mental health specialist since his transfer to HCCF on September 12, 2003. She stated that McKenzie was compliant with his medication until July 11, 2003, at which time he refused his medication for four months consecutively. Saxton stated that McKenzie would be referred to Dr. Surrender, counseled, and asked to sign a consent for or refusal of medication. After the grievance committee and warden concurred with Nurse Saxton’s response, McKenzie appealed. The Director of Mental Health Services found the response inadequate and stated that policy allowed HCCF to involuntarily medicate McKenzie and that he then should have been referred to Deberry Special Needs Facility.

The attached grievance, appeals and responses reflect that McKenzie has, in the past, refused his medication. However, McKenzie did not attach a copy of any grievance filed on January 12, 2005, and the attached grievance, appeals, and responses do not address any current or past issue of retaliation by Dr. Surrender.

The Sixth Circuit has held that 42 U.S.C. § 1997e(a) requires a federal court to dismiss without prejudice whenever a prisoner brings a prison conditions claim without demonstrating that he has exhausted his administrative remedies. Brown v. Toombs, 139 F.3d 1102 (6th Cir.

1998); Lavista v. Beeler, 195 F.3d 254 (6th Cir. 1999) (exhaustion requirement applies to claim alleging denial of medical care). This requirement places an affirmative burden on prisoners of pleading particular facts demonstrating the complete exhaustion of claims. Knuckles El v. Toombs, 215 F.3d 640, 642 (6th Cir. 2000).

In order to comply with the mandates of 42 U.S.C. § 1997e(a),

a prisoner must plead his claims with specificity and show that they have been exhausted by attaching a copy of the applicable administrative dispositions to the complaint or, in the absence of written documentation, describe with specificity the administrative proceeding and its outcome.

Knuckles El, 215 F.3d at 642; see also Baxter v. Rose, 305 F.3d 486 (6th Cir. 2002)(prisoner who fails to adequately allege exhaustion may not amend his complaint to avoid a sua sponte dismissal); Curry v. Scott, 249 F.3d 493, 503-04 (6th Cir. 2001)(no abuse of discretion for district court to dismiss for failure to exhaust when plaintiffs did not submit documents showing complete exhaustion of their claims or otherwise demonstrate exhaustion). Furthermore, § 1997(e) requires the prisoner to exhaust his administrative remedies prior to filing suit and, therefore, he cannot exhaust these remedies during the pendency of the action. Freeman v. Francis, 196 F.3d 641, 645 (6th Cir. 1999).

The plaintiff has submitted no evidence that has administratively exhausted any grievance for retaliation by Surrender. The Sixth Circuit has stated that “[a] plaintiff who fails to allege exhaustion of administrative remedies through ‘particularized averments’ does not state a claim on which relief may be granted, and his complaint must be dismissed sua sponte.”

Baxter, 305 F.3d at 489. As plaintiff has not exhausted his administrative remedies on his claim of retaliation, the Court dismisses this complaint under 42 U.S.C. § 1997e(a).

### III. Appeal Issues

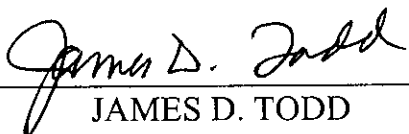
The next issue to be addressed is whether plaintiff should be allowed to appeal this decision in forma pauperis. Twenty-eight U.S.C. § 1915(a)(3) provides that an appeal may not be taken in forma pauperis if the trial court certifies in writing that it is not taken in good faith. The good faith standard is an objective one. Coppedge v. United States, 369 U.S. 438, 445 (1962).

Under Brown v. Toombs an appellate court must dismiss a complaint if a prisoner has failed to comply with 1997e's exhaustion requirements. Accordingly, if a district court determines that a complaint must be dismissed as unexhausted, plaintiff would not yet be able to present an issue in good faith on appeal because that appeal would also be subject to immediate dismissal. Thus, the same considerations that lead the Court to dismiss this case for failure to exhaust administrative remedies compel the conclusion that an appeal would be subject to immediate dismissal. It is therefore CERTIFIED, pursuant to 28 U.S.C. § 1915(a)(3), that any appeal in this matter by plaintiff is not taken in good faith, and plaintiff may not proceed on appeal in forma pauperis.

The final matter to be addressed is the assessment of a filing fee if plaintiff appeals the dismissal of this case. The United States Court of Appeals for the Sixth Circuit has held that a certification that an appeal is not taken in good faith does not affect an indigent prisoner plaintiff's ability to take advantage of the installment procedures contained in § 1915(b).

McGore v. Wigglesworth, 114 F.3d 601, 610-11 (6th Cir. 1997). McGore sets out specific procedures for implementing the PLRA. Therefore, the plaintiff is instructed that if he wishes to take advantage of the installment procedures for paying the appellate filing fee, he must comply with the procedures set out in McGore and § 1915(b).

IT IS SO ORDERED this 28<sup>th</sup> day of December, 2005.

  
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JAMES D. TODD  
UNITED STATES DISTRICT JUDGE



## Notice of Distribution

This notice confirms a copy of the document docketed as number 4 in case 1:05-CV-01027 was distributed by fax, mail, or direct printing on December 30, 2005 to the parties listed.

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Wayne McKenzie  
Hardeman Co. Correctional Facility  
#108203  
P.O. Box 549  
Whiteville, TN 38075--054

Honorable James Todd  
US DISTRICT COURT